COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

HCVAP 2007/008

BETWEEN:

HURON VIDAL

Intended Appellant/Applicant

and

MERLE VIDAL

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins — Justice of Appeal

Appearances on written submissions:

Mrs. Zina Dyer and Ms. Gena Dyer for the Intended Appellant/Applicant
Mrs. Dawn Yearwood-Stewart for the Respondent

2008: January 25

Civil Appeal – Procedural Appeal – rule 62.1(2) of the Civil Procedure Rules 2000 (CPR 2000) - appeal from interlocutory order made by the master – whether High Court judge has jurisdiction to hear application for leave to appeal – whether the court of appeal has jurisdiction to discharge the judge's order – sections 30 and 31 of the Eastern Caribbean Supreme Court (Dominica) Act

The intended appellant/applicant, Mr. Vidal, sought leave to appeal against an interlocutory order made by a master. By that order, the master granted leave to the intended respondent, Mrs. Vidal, to amend her notice to proceed with an application for ancillary relief by adding a prayer for a lump-sum payment and other relief. The application for

leave to appeal against the master's order was heard by a judge of the High Court who dismissed the application on the ground that Mr. Vidal did not require leave to appeal because the appeal was a procedural appeal for which no leave was required. Mr. Vidal applied to discharge the judge's order under rule 62 of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000 ("CPR 2000").

Held – dismissing the application to discharge the judge order and awarding costs to Mrs. Vidal against the applicant, Mr. Vidal:

1. The judge had jurisdiction to hear the application for leave to appeal against the masters' order by virtue of the provisions of sections 30 and 31 of the Eastern Caribbean Supreme Court (Dominica) Act and paragraph 13 of the Court of Appeal Rules, 1968.
2. The Court of Appeal has no jurisdiction to discharge the order of the judge under the provisions of rule 62 or any other rule contained in CPR 2000 because according to rule 2.2(3)(a) CPR 2000 does not apply to family proceedings.
3. The applicant was required to file a fresh application for leave to appeal against the decision of the judge to this court pursuant to 13(3) of the Court of Appeal Rules, 1968, rather than an application to discharge the order by which the judge refused leave to appeal against the master's order.

JUDGMENT

[1] RAWLINS, J.A.: Mr. Vidal applied to discharge an order by which a judge of the High Court refused to grant him leave to appeal against a decision of the master. The primary issues which arise for consideration are whether the judge had jurisdiction to hear the leave application, and, if he did, whether there is any legal and factual bases on which this court should discharge or set aside the judge's order. If the answers to these issues are in the affirmative, secondary issues that will arise are whether a single judge of this court has discretion to discharge the order and, if so, whether the order should be discharged in the circumstances of

this case. If it is found that the order of the judge should be so discharged, the question then would be whether this court should grant leave to appeal the master's order. These issues will be considered against a brief background.

Brief background

[2] Mrs. Vidal filed a notice to proceed with an application for ancillary relief in the High Court on 17th February 2006. On 11th May 2007, a master granted Mrs. Vidal leave to amend her notice to proceed with the application by adding a prayer for a lump sum payment and other relief, which were not included in her original notice. At the time when the master made the order, solicitors for the parties had already filed written submissions with authorities in accordance with an earlier order and directions that were given by another master. In fact, solicitors for Mrs. Vidal filed the application to amend the notice to proceed on 9th March 2007. This was the same day on which they filed and served written submissions in reply to the submissions by solicitors for Mr. Vidal in accordance with the directions of the master.

[3] On 25th May 2007, solicitors for Mr. Vidal filed an application for leave to appeal against the order by which the master permitted Mrs. Vidal to amend the notice to proceed. That application came up for hearing before a High Court judge. The judge found that the master's order was an interlocutory and not a final order. However, he refused to grant Mr. Vidal's application for leave to appeal on the ground that no leave was required because the appeal was a procedural appeal. The order stated:

> "IT IS HEREBY ORDERED that the appeal being a procedural appeal, no leave is required to Appeal against the said Order. Leave to appeal is therefore refused.
> IT IS FURTHER ORDERED that the issue of costs will be dealt with on Friday 22nd June 2007."

On 22nd June 2007, learned Counsel for Mrs. Vidal informed the court that she

was not seeking an order for costs against Mr. Vidal.

[4] On 25th June 2007, solicitors for Mr. Vidal filed an application headed "Notice of Application for Discharge of Order dated 15th June 2007 (Order 62.16(2)(4) CPR 2000)". In that application they prayed for an order discharging the judge's order refusing leave to appeal.

[5] On 13th July 2007, this court issued directions which required solicitors for the parties to file and serve skeleton arguments specifically addressing, *inter alia*, the issue of the jurisdiction of a judge to consider and grant leave to appeal, as well as the jurisdiction to review and vary the judge's refusal to grant leave to appeal.

Did the judge have jurisdiction to hear the leave application?

[6] It is common ground that the decision of the master, which the judge considered, was an interlocutory decision. This is on the basis of the application test which this court laid down in Othniel Sylvester v Satrohan Singh[1] as the appropriate test by which to determine whether a decision or order is interlocutory or final. The order of the master, which permitted Mrs. Vidal to amend her notice to proceed with ancillary relief was interlocutory because it would not have finally determined the issue that arose for litigation between the parties, whichever way the decision on the application went.

[7] I think that it is necessary, for the purpose of resolving the issues in the present matter, to set out the statutory provisions that will elucidate the issues. To this end it is noteworthy that solicitors for Mr. Vidal referred to section 30(2)(g) of the Eastern Caribbean Supreme Court (Dominica) Act[2] to support their submission that the judge of the High Court had jurisdiction to hear and determine the application for leave to appeal. In my view, however, it will be helpful to set out

[1] St. Vincent and the Grenadines Civil Appeal No. 10 of 1992 (18th September 1995.).
[2] Cap. 4:02 of the Revised Laws of Dominica, 1990, hereinafter referred to as "the Supreme Court Act".

section 30(2) sub-paragraphs (f) and (g), as well as the provisions of section 30(3) and section 31 of the Act. These provide as follows:

> "30(2) No appeal shall lie under this section –
>
> (a) - (e) …
>
> (f) without the leave of the Judge making the order or of the Court of Appeal from an order made with the consent of the parties or as to costs where the costs by law is left to the discretion of the Court;
>
> (g) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a judge except –
>
> (i) – (iv) …
>
> (3) For the purpose of subsection (2) "Judge" means the Judge of the High Court.
>
> (31) Where an appeal has been brought under section 30 and is pending before the Court of Appeal, a Judge of the High Court may hear and determine such applications incidental to the appeal and not involving the decision thereof as may be prescribed by the rules of court; but an order made under any such application may be discharged or set aside by the Court of Appeal."

[8] The master exercises the powers of a judge to hear and determine procedural and interlocutory matters in the High Court. Section 30(2)(g) read with section 30(3) of the Supreme Court Act permits "the judge" to give leave to appeal from interlocutory judgments or orders of "a judge". This perforce would include the granting of leave from interlocutory judgments or orders of a master who exercises the powers of a judge in these matters. It is noteworthy that section 30(2)(g) confers the discretion to grant leave to appeal upon "the judge" and that section 30(3) defines judge as "the Judge (of the High Court)". The question is whether "the judge" means the judge who made the order being appealed or any judge of the High Court.

[9] At first blush I was minded to think that that the discretion under section 30(2)(g) is exercisable by any judge of the High Court. I noted that section 30(2)(f) specifically confers the discretion to grant leave from a consent order or from an order as to costs, for example, upon "the Judge making the order". However,

section 30(2)(g) confers the discretion to grant leave upon "the Judge" and not specifically upon the Judge making the order. The absence of express reference to "the Judge who made the order" in section 30(2)(g) renders it less clear whether the discretion under this latter sub-section is exercisable only by the judge who made the order being appealed against or any judge of the High Court.

[10] It is noteworthy that section 31 of the Supreme Court Act permits "a judge" of the High Court to hear and determine such applications that are incidental to an appeal under section 30 as may be prescribed by the rules of court. Learned counsel for Mr. Vidal submitted that rule 2.5(3)(a) of CPR 2000 permits the functions of this court relating to an application for leave to appeal to be carried out by a single judge of this court. I respectfully do not agree that this rule has any relevance in these proceedings inasmuch as rule 2.2(3)(a) of CPR 2000 specifically states that the rules contained in CPR 2000 are not applicable to family proceedings. It was therefore necessary to go to the Eastern Caribbean States Court of Appeal Rules, 1968, and, in particular, paragraph 13 which is under the heading "Appeal by leave only".

[11] Paragraph 13 of the Court of Appeal Rules states as follows:

> "13. (1) Where an appeal lies by leave only, any person desiring leave to appeal shall apply for leave within fourteen fays either by notice of motion or by summons (whichever is appropriate) and such application shall be made to the Court or the court below or to the Judge who made the Order; the period of fourteen days shall run from the date of the decision against which leave to appeal is sought.
>
> (2) If leave is granted the appellant shall file a notice of appeal as provided by rule 12 of these Rules within fourteen days from the grant of leave and a copy of the order granting leave shall be annexed to the notice of appeal.
>
> (3) Where an application has been refused by the court below, an application for a similar purpose may be made to the Court within seven days from the date of the refusal."

[12] Since under paragraph 13(1) of the Court of Appeal Rules an application for leave

may be made to the judge who made the order as well as to the court below, it follows that any judge of the court below has jurisdiction to hear such an application. The judge therefore had jurisdiction to hear the leave application. The question then is whether this court has jurisdiction to discharge the order that the judge made refusing leave.

Can this court discharge the judge's order?

[13] Learned counsel for Mrs. Vidal submitted that this court has no jurisdiction to vary or discharge the judge's refusal to grant leave. On the other hand, learned counsel for Mr. Vidal relied on sub-rules 62.16(2) to 62.16(4) of CPR 2000, on which the application to discharge was specifically based, as authority for the application to discharge the judge's order.

[14] Rule 62.16 is under the rubric "Powers of single judge of the court, master and Chief Registrar … to make certain orders". Rule 62.16(1) confers discretion on a single judge of this court to make specific orders relating to appeals. These are orders for injunctive relief restraining a party from parting with the possession of the subject matter of an appeal. They also include orders for stay of execution of a judgment pending the determination of an appeal, and orders extending or abridging any time limit prescribed under Part 62 of CPR 2000. Rule 62.16(2) empowers the Chief Justice to designate a master or the Chief Registrar to make orders granting extension of time limits prescribed by Part 62 of the rules. Rule 62.16(3) states that an order made by a master or the Chief Registrar may be varied or discharged by a single judge of this court. Rule 62.16(4) provides that an order made by a single judge of this court, a master or the Chief Registrar may be varied or discharged by this court.

[15] Learned counsel for Mr. Vidal submitted that the effect of rule 62.16 of CPR 2000 is that the decision of the judge can be varied or discharged by this court, just as if the decision was one of a single judge of this court. I respectfully do not agree

with this submission for 2 reasons. The first reason is that rule 62.16 refers to the orders for which specific discretion is granted under the rule. Those orders do not include an order in which a judge of the High Court refuses to grant an application for leave to appeal to this court. In the second place, as stated earlier in this judgment, family matters are expressly exempted from the purview of the rules contained in CPR 2000 by virtue of rule 2.2(3)(a) of CPR 2000.

[16] It was seen, in paragraph 7 of this judgment, that section 31 of the Supreme Court Act permits this court to discharge or set aside an order of a judge of the High Court. This power is however exercisable only in relation to a decision which the judge makes on an application that is incidental to an appeal which is brought under section 30 of the Supreme Court Act and where the appeal is pending before this court. Section 31 contemplates circumstances in which leave to appeal has already been given under section 30. An appeal could not be pending before leave to appeal has been obtained. Therefore, the decision of the judge which Mr. Vidal applied to have discharged was not incidental to an appeal that was pending before this court because his application was merely for leave to appeal. Solicitors for Mr. Vidal should have made a fresh application for leave to appeal to this court pursuant to paragraph 13(3) of the Court of Appeal Rules within 7 days from the date of the judge's order. Instead they filed an application to discharge the order.

[17] It is unfortunate that solicitors for Mr. Vidal did not file a fresh application to this court for leave to appeal because the appeal from the master's order was an appeal from an interlocutory order. Section 30(2)(g) of the Supreme Court Act specifically requires any person who wishes to appeal against an interlocutory order to obtain the leave of the judge or of this court to appeal. This subsection specifically exempts from the leave requirement interlocutory judgments or orders which relate to the liberty of the subject or the custody of infants, as well as orders granting or refusing an injunction or appointment of a receiver. It also exempts an order in the case of a decree nisi in a matrimonial cause or a judgment or order in an admiralty action determining liability. Since the master's order in the present

case does not fall into any of these exceptions, Mr. Vidal correctly applied for leave to appeal. Had he simply filed a notice of appeal, that notice would have been a nullity on the authority of Sylvester v Singh and kindred cases.

[18] Premised on the conclusion at which I arrived at paragraph 16 of this judgment that an application for leave should have been made to this court rather than an application to discharge the judge's order I shall dismiss the application. The order on this application, therefore, is that the application which Mr. Vidal filed herein on 25th June 2007 to discharge the order that the judge made on 15th June 2007 is dismissed. Mr. Vidal shall pay $600.00 costs on this application to Mrs. Vidal.

Hugh A. Rawlins
Justice of Appeal